Supreme Court, U.S.
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No. 02-

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT M. NISSENBAUM,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May the "scheme or artifice to defraud" which is necessary to a federal mail fraud prosecution be based on a defendant's mere failure to disclose material facts, where no fiduciary or other special relationship exists and no positive law creates a duty to disclose the omitted facts?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Nissenbaum and respondent United States). Petitioner knows of no related cases.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Robert M. Nissenbaum respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit affirming his conviction and sentence for mail fraud involving his receipt of disability insurance benefits.

OPINIONS BELOW

The Third Circuit's not-for-publication decision (per Roth, J., with Rendell and Rosenn, JJ.), was filed October 30, 2002. The opinion is available at 50 Fed. Appx. 87 and 2002 WL 31424654. A copy is attached as Appendix A. The United States District Court for the Eastern District of Pennsylvania (Waldman, J.) wrote no pertinent opinion. The district court's Memorandum Order denying the post-trial motions is Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming the petitioner's conviction and sentence was filed and entered on October 30, 2002. Appx. A; see *United States v. Nissenbaum*, 50 Fed.Appx. 87, 2002 WL 31424654. A timely petition for rehearing was denied by the Third Circuit on December 13, 2002. Appx. C. This petition is being filed by postmark on or before the 90th day thereafter. Rule

13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF FEDERAL STATUTE INVOLVED

Section 1341 of title 18, United States Code, the federal mail fraud law, as amended in 1994, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, ... for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier ... shall be fined under this title or imprisoned not more than five years, or both. ....

18 U.S.C. § 1341.

STATEMENT OF THE CASE

This petition presents an important and recurring question concerning the scope of the federal mail, wire and bank fraud statutes, an issue with which this Court has grappled repeatedly over the past 90 years. Petitioner was convicted after a trial on charges that he

schemed to defraud an insurance company out of benefits under the disability policy he had purchased, by failing to disclose the true extent of his disabilities and the existence of a new occupation.

a. ***Procedural History***

Petitioner Robert Nissenbaum, a former attorney, was convicted after a jury trial in the Eastern District of Pennsylvania. The grand jury returned a 19-count, one-defendant indictment on September 21, 2000, CA3 App. 37, charging that petitioner devised a scheme or artifice to defraud Provident Life and Accident Co., and to obtain money by false and fraudulent pretenses, in connection with a claim for disability insurance, between "in or about April 1994 and in or about April 1998," CA3 App. 42, and that for the purpose of executing that scheme he used a commercial interstate carrier (Airborne Express) on 19 particular occasions between November 1, 1995, and May 2, 1997. CA3 App. 47-48. He made his initial appearance and was released on a recognizance bond.

Trial proceeded for five days before U.S. District Judge Jay C. Waldman and a jury. The jury convicted petitioner in January 2001 on all counts. Bail was continued pending sentencing. On February 5, 2001, the defendant filed a timely motion for judgment of acquittal and for a new trial. These post-trial motions were denied by memorandum and order filed May 8, 2001. Appx. B.

Sentence was imposed on June 7, 2001. The court imposed a 21-month prison sentence, followed by three years' supervised release. Imposition of any fine was waived due to inability to pay, but the court ordered the defendant to pay $140,360 in restitution to Provident under 18 U.S.C. § 3663A, and to pay $1600 in special assessments pursuant to 18 U.S.C. § 3013.

The judgment was entered on the docket June 12, 2001. The defendant then took a timely appeal to the United States Court of Appeals for the Third Circuit. Without objection, the trial court granted the defendant bail pending appeal. On July 22, 2002, the Third Circuit filed its opinion and judgment (per Roth, J.) affirming petitioner's convictions. Appx. A. Following the denial of rehearing by the court of appeals, Appx. B, the court of appeals by Order dated January 6, 2003, granted petitioner's motion to stay the mandate, pending filing of this petition. Petitioner thus remains on bail as of this filing.

b. *Statement of Facts*

Petitioner Robert M. Nissenbaum was a self-employed attorney whose practice was devoted primarily to representing plaintiffs in personal injury cases, and occasionally persons with immigration problems. In 1987 he took out three disability policies with Provident Life and Accident Insurance Company. One was a business overhead policy, which promised to pay up to $5,000 a month for up to two years to cover the expenses of keeping the office open during periods of covered disability; the second and third policies were regular disability policies which each paid $4,230 a month, one for life and the other to age 65, in the event that the insured became disabled.

The policies paid benefits only in the event that petitioner became "totally disabled," which the policies defined to mean an inability to perform the "substantial and material duties of your occupation." The business overhead policy defined "your occupation" to be "the occupation or occupations in which you are regularly engaged at the time you become disabled." The other

policies defined "your occupation" somewhat differently. In addition to the language quoted above, these policies provided that "if your occupation is limited to a recognized specialty within the scope of your degree or license, we will deem your specialty to be your occupation."

Under Provident's interpretation of the policies, if an insured had more than one "occupation" when he became disabled, he would have to be totally disabled with respect to each occupation before he would be entitled to benefits. Provident interpreted the term "substantial and material duties" to mean "the important and the majority duties of your occupation that you perform on a daily basis at the time that you become disabled."

In March 1994, seven years after he had taken out the disability policies, petitioner injured his back in a Baltimore hotel room. After he managed to get into their car, his wife drove him home to Pennsylvania. He spent the next five weeks flat on his back in bed.

That April, petitioner was treated by a medical doctor who is a certified disability evaluator. An MRI showed degenerative changes in petitioner's lower back and a small herniation in a disc. From this objective evidence alone, the doctor would "strongly suspect the patient would have some type of subjective complaint."

The doctor testified that petitioner had reported that he was unable to work as a trial attorney, which petitioner told this doctor required him to sit or stand for prolonged periods. He could only stand for one to two hours before having to lie down to rest, he said, and the pain made it difficult for him to concentrate. Based upon this description of his work, the doctor concluded that petitioner was disabled from performing as a trial lawyer.

An ear, nose and throat specialist testified that petitioner first came to him in 1992 complaining of hearing loss; he had difficulty hearing in courtrooms due to background noises. Tests showed a "borderline" problem in petitioner's right ear, and "definite hearing loss" in his left ear. His ability to "discriminate" speech (i.e., "understand consonants) varied from test to test. This doctor testified that an inability to "discriminate" speech cannot be remedied with a hearing aid.

The doctor concluded based on his tests and petitioner's description of his problem that petitioner had difficulty hearing in a courtroom due to poor acoustics. In a courtroom, petitioner might have difficulty understanding someone who was not facing him when speaking, and he could not be assured that he would hear words correctly. The ear doctor did not believe that petitioner would have difficulty understanding speech in a conference room where people are facing each other while speaking.

In April 1994, petitioner applied to Provident for disability benefits under all three policies, claiming that he became disabled in March 1994. Provident approved petitioner's claims and over the next three years paid him $441,480 in benefits.

In March 1994, in addition to practicing law, petitioner and his wife owned "Mystery Books," a bookstore which they opened in April 1990. Although there was substantial evidence of what petitioner did at the bookstore after he became disabled, and some evidence of involvement in running the store a year or two prior to his becoming disabled, there was no testimony at trial which addressed what he did at the store at the time in March 1994 when he became disabled.

Between December 1995 and September 1997, petitioner was the subject of surveillance in and outside of his bookstore. This evidence confirmed testimony that in addition to practicing law, petitioner worked at the bookstore during this period. At the bookstore, petitioner waited on customers and wrapped books for shipping. He did not carry anything heavy. He was also able to sit or stand as necessary.

The only evidence of petitioner's involvement in the bookstore at the time he became disabled was his own testimony. Petitioner stated that the bookstore had nothing to do with his disability claim:

> because ... I was not at the time a bookseller. I am now, but I was not at the time a bookseller. I was never a bookseller. Someone else ran the store. We had people in the store all the time, and we used to flit in and out, and -- you know, when we wanted to. If we wanted to go buy books, we'd drive off in our old truck and buy some books. But it was a hobby. It was something we enjoyed doing, and it was -- it's completely irrelevant or it was at the time.

In March 1994, petitioner's law practice consisted primarily of representing plaintiffs in personal injury cases. Although he handled every aspect of each case through settlement or arbitration, he had not tried a case before a judge or jury since in or about 1984, when he vowed never to try another case in court. An expert witness testified without contradiction for the defense that even though petitioner had decided not to try cases, he was entitled to call himself a trial attorney because he had a litigation practice and had tried cases in the past.

In petitioner's application for benefits, he claimed to be disabled from practicing as a "trial attorney," because his hearing impairment prevented him from hearing legal testimony and argument, because his spinal injury prevented the mobility necessary to perform as an attorney in court trials and hearings, and because he could not carry objects such as dictating machines, computer/word processors, exhibits, models, blackboards, briefcases, law books, and files. Petitioner stated that the heaviest thing he had to lift as a trial attorney was a 50-pound briefcase, which he claimed he had to lift "uncountable" times on a daily basis. Petitioner did not mention his involvement with his bookstore.[1] Each month from 1995 through 1997, petitioner supplied essentially the same information: he was able to perform "some desk work and telephone work, for about one month it was nearly all done from bed." Petitioner never reported his activities at the bookstore.

In January 1997, Provident sent petitioner a special form which asked for more information on his daily activities. In response, petitioner wrote that he spoke

[1] Provident became aware of petitioner's involvement with the bookstore after he turned over his 1992 tax return in response to a request by Provident. The return included a Schedule K which provided financial information on the bookstore. When his involvement in the bookstore grew to the point at which he thought he may have an obligation to inform Provident of what he did in the store, petitioner consulted an attorney. This lawyer testified that he advised petitioner that he was under no obligation to volunteer information concerning the bookstore, because his involvement did not qualify as an "occupation" under the terms of the policies, but that he should answer truthfully if he were questioned about the store.

with his office staff almost every day, but visited the office irregularly, never staying more than two hours and often staying as little as 15-30 minutes.

The defense expert testified that attorneys with litigation practices, such as petitioner had, must be able to take cases to trial, and also must be perceived as able to do so, whether or not they actually try cases, not only to obtain good settlements but also to maintain the health of the attorney's practice.

The parties stipulated that petitioner sent each of the items charged in Counts 1-19, on the dates charged, by Airborne Express. The stipulation further stated that at the time the items were sent, Airborne Express was a "private or commercial interstate carrier," as that term is used in the mail fraud statute (as amended in 1994).

c. *Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)* The United States District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed in the district. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

REASON FOR GRANTING THE WRIT

The Third Circuit's ruling in this case conflicts with decisions of other circuits which exclude mere omission from the scope of prosecutable mail fraud schemes.

In conflict with the law of every circuit to have examined the issue in any depth, and in conflict with more than a century of this Court's case law, the court below held that the jury instructions delivered in this case were proper, even though they allowed mail fraud convictions for nothing more than failure to reveal a material fact in an application for insurance benefits, in the absence of active concealment or any fiduciary relationship or affirmative legal duty. Certiorari should be granted to establish the proper application of these important federal criminal statutes.

The trial court instructed the jury in this case that:

> [T]he Government has charged the defendant ... with the crime of mail fraud. They [sic] allege that between the spring of 1994 and the spring of 1998, he knowingly, willfully and intentionally devised a scheme or an artifice to defraud the Provident Insurance Company, and for obtaining money from them [sic] by means of false representations or pretenses.
>
> They essentially allege that he misrepresented his true physical condition, and his status or non-status as a trial attorney, and concealed information about his ownership of a bookstore, for the purpose of obtaining disability insurance benefits, to which they allege he was not entitled and knew he was not entitled.

CA3 App. 6-7. The court told the jury that it could convict petitioner on any one or more of those factual theories -- misrepresentation of current physical condition, misrepresentation of occupation as a trial attorney as of the date of disability, and "concealment" of petitioner's "ownership" of the bookstore -- so long as the jurors were unanimous as to the specific theory. CA3 App. 12. In particular, the court advised the jury that "A false or fraudulent representation may be made by a *statement of half-truths*, or *the concealment of a material fact*, as well as by an affirmative statement or act." CA3 App. 12 (emphasis added).

The indictment in this case had charged that petitioner devised a scheme to defraud Provident Mutual Insurance Company and to obtain money and property from Provident by false and fraudulent pretenses, in violation of 18 U.S.C. § 1341. The indictment alleged that the scheme was executed in three ways: that petitioner "misrepresented the nature of his occupation" as of the alleged onset of the disability by claiming to be a "trial lawyer"; that he "repeatedly omitted from his communications with Provident the material fact that [in March 1994] he held a second occupation" as proprietor of a book store; and that he "falsely represented that he was disabled as defined in the policies." CA3 App. 45-46. The jury instructions at the conclusion of the trial thus equated the indictment's allegation of repeated omission with the notion of "concealment," without further elaboration,[2] and authorized the jury to convict on that basis

[2] The court below mistakenly suggested that the instruction Judge Waldman delivered was "along the lines suggested by Nissenbaum." Appx. A4. It is true that the defense request to charge focused on "concealment," while the government

alone, if convinced beyond a reasonable doubt. The court failed to advise the jury that fraudulent concealment, as contrasted with mere nondisclosure, requires "deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or prevent further inquiry into a material matter." *United States v. Colton*, 231 F.3d 890, 899 (4th Cir. 2000). Since the jury could easily have taken the trial court's undefined and unexplained use of the term "concealed" to mean "omitted," as the indictment did and as the prosecutor repeatedly did in closing argument. An appellate court is therefore bound to assume that the jury so understood it. See *Victor v. Nebraska*, 511 U.S. 1, 6 (1994); *Francis v. Franklin*, 471 U.S. 307, 322 (1985).

But that construction, equating concealment with omission and permitting conviction on that basis, would be wrong as a matter of law. In *McNally v. United States*, 483 U.S. 350, 358-59 (1987), this Court rejected the "disjunctive" reading of the mail fraud statute, under

_____(cont'd)

wanted the court to use the term "omission." Nevertheless, the Third Circuit's characterization is essentially incorrect, because the defense asked the court also to *define and clarify* the concept of "concealment" as what the law of fraud calls "active concealment," that is, "to secrete, falsify, mutilate, fraudulently transfer, withhold information or knowledge required by law to be made known, or to take any action preventing discovery." CA3 App. 85 (citing Seventh Circuit standard instructions). Instead, no definition was given, with the result that concealment could easily have been taken as meaning little or nothing beyond "omission." The clear presentation by the defense of a correct instruction adequately preserved the issue for appellate review. The court below did not disagree; the Third Circuit opinion does not apply a plain error standard of review.

which the first ("scheme to defraud") clause is taken to be broader than the second ("to obtain money or property") and to encompass all material omissions. As the Court explained in *McNally*, the statute when enacted in 1872 originally contained only the "scheme to defraud" clause, which was susceptible to a rather *narrow* reading, in reliance on certain common law restrictions; the clause prohibiting all schemes "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" was added 1909 only to codify the holding in *Durland v. United States*, 161 U.S. 306 (1896), which had held the statute not to be limited to false statements of present facts.

The court below failed to acknowledge or apply this Court's recent reminders that legally cognizable theories of a "scheme and artifice to defraud" under the mail fraud law are limited to those which would have been recognized in the common law as of 1872. See *Cleveland v. United States*, 531 U.S. 12, 18-20 (2000); *Neder v. United States*, 527 U.S. 1, 21-23 (1999); *McNally*, 483 U.S. at 358-59. Several of the Third Circuit's cases simply cannot be squared with that limiting principle, as Chief Judge Becker has recently acknowledged. See *United States v. Panarella*, 277 F.3d 678, 698 (3d Cir. 2002).[3] Among such cases are those which fail to distinguish

[3] The issue in *Panarella*, a case involving conflict of interest by a public official (which is considered a form of fiduciary violation) was the proper scope of 18 U.S.C. § 1346, the "honest and faithful services" definitional provision enacted by Congress in reaction to this Court's *McNally* decision. The principal questions at issue in *Panarella* are therefore not directly pertinent to the instant case.

clearly between mere "omissions," on the one hand, and "elaborate efforts at concealment," on the other.

Allowing conviction on the basis of an omission alone, even when called "conceal[ment]," was error. The jury instructions essentially quoted the Third Circuit's decision in *United States v. Olatunji*, 872 F.2d 1161, 1167 (3d Cir. 1989), which allows a mail fraud conviction based on "deceitful statements of half-truths or the concealment of material facts." But *Olatunji* overlooks the critical limitation, recognized by the vast majority of other circuits, that nondisclosure is not covered by the mail fraud statute without proof of a fiduciary relationship, a legal duty of disclosure, or perhaps of active concealment. Compare *Colton*, 231 F.3d at 897-904 (4th Cir. 2000) (arguing for coverage of active concealment without proof of fiduciary or legal duty), with *United States v. Holzer*, 816 F.2d 304, 307 (7th Cir.), *cert. granted & jmt. vacated on other grnds.*, 484 U.S. 807 (1987) ("classical definition of fraud ... 'in its elementary common law sense'" does not encompass mere omission but only "'the deliberate concealment of material information in a setting of fiduciary obligation'").

The Second Circuit, in contrast with the court below, has plainly stated, in *United States v. Von Barta*, 635 F.2d 999, 1006-07 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981), a prosecution of a securities broker, that nondisclosure is not covered by the mail fraud statute without proof of some duty to disclose. 926 F.2d at 1416. See also *United States v. Bronston*, 658 F.2d 920 (2d Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) (breach of fiduciary duty to client by attorney).[4] See also *Kehr Packages,*

[4] As an "intangible rights" case, however, *Bronston* was effectively overruled on the merits by *McNally*.

Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1416 (3d Cir. 1991) (civil RICO action based on mail fraud), characterizing holding of *Reynolds v. East Dyer Development Co.*, 882 F.2d 1249 (7th Cir. 1989). Accord, *United States v. Dowling*, 739 F.2d 1445, 1448-49 (9th Cir. 1984) ("non-disclosure can only serve as a basis for a fraudulent scheme when there exists an independent duty that has been breached by the person so charged"; "independent duty may exist ... in the form of a fiduciary duty ... or may derive from an independent explicit statutory duty ...."); *United States v. Irwin*, 654 F.2d 671, 679 (10th Cir. 1981) ("no criminal conviction for failure to disclose when no duty to disclose is demonstrated"). Simple omission and possibly not even active concealment constitutes "fraud" under § 1341 in the absence of a special fiduciary relationship.

As the beneficiary of an insurance policy, petitioner was not a fiduciary of his insurance company. (A fiduciary duty exists in the relationship between insurer and policyholder, but the duty runs in the opposite direction: the company owes a fiduciary duty to its insured, not the other way around, as would have to exist to support the "concealment" theory in this case.) As this Court concluded in *Chiarella v. United States*, 445 U.S. 222, 235 (1980), "When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." Here, petitioner had no "duty to speak." The Court in *Chiarella* relied on Restatement of Torts (Second) § 551(2) (1977), *see* 445 U.S. at 228 & n.9, which would disallow even civil liability for nondisclosure in petitioner's circumstances. No case from this Court has approved a conviction based on allegedly material omissions made by a non-fiduciary and without reliance on any legal duty of disclosure.

The rule that silence with respect to facts known to one party but not the other is not ordinarily fraudulent was first stated and applied by Chief Justice Marshall in *Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178 (1817). It was followed throughout that Century, including the 1870's and into the era of 1909. See *Strong v. Repide*, 213 U.S. 419, 430 (1909); *Doyle v. Union Pacific Ry.*, 147 U.S. 413, 427-28 (1893); *Tyler v. Savage*, 143 U.S. 79, 98 (1892); *Stewart v. Wyoming Cattle Ranche Co.*, 128 U.S. 383 (1888). The exception for fiduciary and trust relationships was equally well settled in 1872, but even that was narrowly construed. Compare *Cosby v. Buchanan*, 90 U.S. (23 Wall.) 420, 454 (1875) (family trustee in estate dispute; theory of fraudulent omission sustained),[5] with *Magee v. Manhattan Life Ins. Co.*, 92 U.S. 93 (2 Otto 92) (1876) (refusing to find fraud in nondisclosure, even by surety).

Prosser's hornbook likewise refers to "the older cases" which "commonly ... stat[e]" that an action for deceit will not lie on the basis of "mere silence, or a passive failure to disclose facts of which the defendant has knowledge ...." *Prosser and Keeton on the Law of Torts* § 106, at 737 (5th ed. W. Page Keeton 1984).[6] The only specific category of exception that Prosser & Keeton

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[5] This case is captioned *"Crosby" v. Buchanan* in West's Supreme Court Reporter.

[6] The hornbook adds, "To this general rule, if such it be, the courts have developed a number of exceptions, some of which are as yet very ill defined, and have no very definite boundaries." *Id.* at 738. Under *Neder*, following *McNally v. United States*, 483 U.S. 350 (1987), such "ill defined" judge-made "exceptions" cannot support federal criminal liability.

mention is for confidential or fiduciary relationships.[7] *See also* W. Page Keeton, *Fraud -- Concealment and Non-Disclosure*, 15 Tex.L.Rev. 1 (1937). The decision below is inconsistent with more than a century of precedent explaining the law of fraud.

Treatises contemporaneous with the enactment of the mail fraud law also exclude failures to disclose, in the absence of a fiduciary relationship, from the scope of what is deemed to be fraud. 1 Melville M. Bigelow, *A Treatise on the Law of Fraud on its Civil Side* 594 (1890) ("the general rule ... declares silence to have no effect"; in "transactions between parties to confidential relations ... silence is fatal"); accord, Melville M. Bigelow, *A Treatise on the Law of Fraud on its Civil Side* ch. IX ("Silence; Duty to Speak") (1888); Melville M. Bigelow, *The Law of Fraud and the Procedure Pertaining to the Redress Thereof* 39, 190-92 (1877); see also 1 Thomas M. Cooley, *A Treatise on the Law of Torts* 908 (3d ed. J. Lewis 1906) ("In general mere silence, a mere failure to apprise the party with whom one is dealing of facts important for him to know for the protection of his own interest in the particular transaction, is no fraud."); 1 Charles L. Corbin, *Benjamin's Treatise on the Law of Sale of Personal Property* § 640, at 558 (4th Amer. ed. 1893) ("The mistaken belief as to facts [necessary to fraud] may be created by active means, as by fraudulent concealment or

[7] "Beyond this," adds the treatise, "there has been a rather amorphous tendency on the part of most courts in recent years to find a duty of disclosure when the circumstances are such that the failure to disclose something would violate a standard requiring conformity to what the ordinary ethical person would have disclosed." *Id.* at 739. Again, this is hardly a criminal standard tied to the understandings of 1872.

knowingly false representation; or passively, by mere silence when it is a duty to speak"); see generally 1 Joseph Story, *Commentaries on Equity Jurisprudence* (13th ed. M. Bigelow 1886) (ch. VI ["Actual or Positive Fraud"], ch. VII ["Constructive Fraud"]).

The government might have proceeded on a theory that the answers petitioner *did* give to questions posed by Provident about his "occupation" or about his "daily activities" were simply *false*, by virtue (for example) of being incomplete. But it could not -- as the jury instructions permitted here -- lawfully seek a conviction for "fraud" simply on the basis of what the defendant "repeatedly omitted" to tell Provident, nor is an omission, no matter how deceitful, the same as "concealment." Even if the Court were to find only the "concealment" theory (as charged to the jury) invalid in this case, and not the two "misrepresentation" bases for conviction, at least a new trial would be required. A jury's general verdict cannot survive if one of the theories on which conviction may rest is legally invalid. See *Griffin v. United States*, 502 U.S. 46, 55-56 (1991), discussing *Yates v. United States*, 354 U.S. 298, 312 (1957); *Chiarella*, 445 U.S. at 237 n.21.

As two other Circuits have emphasized, "Not all conduct that strikes the court [or a federal prosecutor] as sharp dealing or unethical conduct is a 'scheme or artifice to defraud.'" *Reynolds*, 882 F.2d at 1252; accord, *United States v. Brown*, 79 F.3d 1550, 1562 (11th Cir. 1996). The federal government overreached in this case by prosecuting what was at worst a questionable but rather ordinary claim against an individual's insurance policy.[8]

[8] Because the alleged fraud was not directed at the public at large, but consisted of statements (and omissions) directed at

In conflict with the other circuits, the Third Circuit's decision in this case endorses an unprecedented and dangerous expansion of the scope of the mail and wire fraud laws, in disregard of this Court's cases.

Resolution of this division of opinion deserves the attention of this Court. For this reason, the petition for certiorari should be granted.

CONCLUSION

For the foregoing reasons, petitioner ROBERT NISSENBAUM prays that this Court grant his petition for a writ of certiorari, and reverse the judgment of the United States Court of Appeals for the Third Circuit affirming his mail fraud convictions.

Respectfully submitted,

PETER GOLDBERGER
Counsel of Record
Attorney for Petitioner

March 13, 2003.

_____(cont'd)
a particular insurance company, in relation to a single customer, this prosecution appears to have run afoul of yet another historical limitation on the law of criminal fraud that was recognized in the 1870s -- the difference between "public" and "private" fraud. *See* Ellen S. Podgor, *Criminal Fraud*, 48 Amer.U.L.Rev. 729, 736 & n.49 (1999). This issue was not raised below. If the Court grants certiorari and wishes to consider it, the petitioner will be pleased to brief that issue as well.

APPENDIX A

50 Fed.Appx. 87, 2002 WL 31424654

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 01-2599

UNITED STATES OF AMERICA,

v.

ROBERT M. NISSENBAUM,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Action No. 00-cr-00570)
District Judge: Honorable Jay C. Waldman

Submitted Under Third Circuit LAR 34.1(a)
on June 13, 2002

Before: ROTH, RENDELL and ROSENN,
Circuit Judges

(Opinion filed October 30, 2002)

OPINION

ROTH, Circuit Judge:

**1 This appeal follows a jury trial at which the appellant, Robert Nissenbaum, was convicted on 19 counts of mail fraud under 18 U.S.C. § 1341 and sentenced to 21 months in prison. Nissenbaum contends on appeal that (1) the District Court abused its discretion in declining to hold a hearing on Nissenbaum's pretrial motion to dismiss the indictment for prosecutorial misconduct, and (2) Nissenbaum is entitled to a new trial because the indictment was based on an allegedly legally invalid theory of mail fraud, which error was allegedly compounded by the instructions given to the jury.

We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. We review a denial of a hearing on a pretrial motion for an abuse of discretion, see United States v. Voigt, 89 F.3d 1050, 1066-1068 (3d Cir.), cert. denied, 519 U.S. 1047 (1996), and review for plain error jury instructions to which no objection was preserved at trial. See United States v. Antico, 275 F.3d 245, 265 (3d Cir.2001).

The facts of this case will not be recited here as they are well known to the parties.

Nissenbaum claims that the District Court abused its discretion in declining to hold a pretrial hearing on his allegation that the government investigation involved prosecutorial misconduct. He contends that the government acted impermissibly by allowing him to

submit to a deposition without informing him that he was the subject of a criminal investigation.

*88 A defendant seeking a hearing on the prosecutor's alleged investigative misconduct must make a prima facie showing of the alleged wrongdoing. See generally United States v. Armstrong, 517 U.S. 456, 463-468 (1996). Nissenbaum failed to demonstrate unconstitutional conduct by the government. The District Court gave Nissenbaum the opportunity to renew his motion for a hearing by filing affidavits which would support his allegations of collusion. Nissenbaum failed, however, to effectively support these allegations. Thus, we hold that the District Court did not abuse its discretion in denying Nissenbaum's motion without a hearing.

Nissenbaum also alleges that he is entitled to a new trial because the indictment was based on a legally invalid theory of mail fraud[1] and that this error was compounded by the instructions given to the jury. He argues that the jury instruction was insufficient because it permitted the jury to find concealment if it found Nissenbaum had stated "half-truths, or failed to disclose facts." He urges instead that we should hold that a duty to disclose is required in order for nondisclosure to fall within the scope of the mail fraud statute. The indictment against Nissenbaum charged, however, that he made communications which included material omissions or at best, half-truths. Thus, the allegations

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[1] Nissenbaum did not raise this objection in the District Court and thus we can construe the indictment liberally in favor of validity. See United States v. Cefaratti, 221 F.3d 502, 507 (3d Cir. 2000).

against Nissenbaum were more than a simple failure to disclose. Mail fraud "must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive ...." United States v. Pearlstein, 576 F.2d 531, 535 (3d Cir. 1978). Such "'fraudulent representations' [under § 1341] may be effected by deceitful statements of half-truths or the concealment of material facts ...." United States v. Olatunji, 872 F.2d 1161, 1167 (3d Cir. 1989) (quoting United States v. Allen, 554 F.2d 398, 410 (10th Cir. 1977)). Nissenbaum made false statements concealing material facts to Provident in describing his daily routine and he failed to make any reference to the bookstore he owned. We conclude that the indictment properly charged false statements and material misrepresentations and omissions. Thus, it did not rest on an invalid theory. Further, the District Court properly charged the jury on the elements of a fraudulent scheme; indeed, it did so along the lines suggested by Nissenbaum.

**2 For the aforementioned reasons, we will affirm the order of judgment of the District Court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL ACTION**
v.	:	**NO. 00-570-01**
RICHARD NISSENBAUM	:	

MEMORANDUM ORDER

Defendant was found guilty by a jury on nineteen counts of mail fraud in connection with his presentation of claims for insurance benefits under "own occupation" disability policies issued by Provident Life & Accident Insurance Company. The government claimed that defendant fraudulently misrepresented his occupational specialty as that of "trial attorney," fraudulently misrepresented the extent and physical effects of hearing and back conditions, and had fraudulently concealed his activity as a bookstore operator.

In assessing a motion for judgment of acquittal for insufficiency of the evidence, the court must view all of the evidence in a light most favorable to the government, draw all reasonable inferences and credibility determinations in favor of the verdict, and decide whether a jury rationally could have found guilt beyond a reasonable doubt. See U.S. v. Aguilar, 843 F.2d 155, 157 (3d Cir.), cert denied, 488 U.S. 924 (1988); U.S. v. O'Keefe, 825 F.2d 314, 319 (11th Cir. 1987); U.S. v. Coleman, 811 F.2d 804, 807 (3d Cir. 1987); U.S. v. Carson, 702 F.2d 351, [*2]361 (2d Cir. 1983); U.S. v. Phifer, 400 F. Supp. 719, 724 (E.D. Pa. 1975), aff'd, 532 F.2d 748 (3d Cir. 1976).

A court may weigh the evidence and consider credibility when deciding a motion for a new trial on the ground that the verdict is contrary to the weight of the evidence, however, such a motion should be granted on this ground only where the weight of the evidence preponderates so heavily against the verdict that to allow it to stand would result in a miscarriage of justice. See U.S. v. Robertson, 110 F.3d 1113, 1116 (5th Cir. 1997); U.S. v. Martinez, 763 F.2d 1297, 1312-1313 (11th Cir. 1985); U.S. v. Clemons, 648 F. Supp. 1116, 1119 (W.D. Pa. 1987), aff'd, 843 F.2d 741 (3d Cir.), cert. denied, 488 U.S. [sic] (1988). "The court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." Martinez, supra.

Although the court has reviewed and considered the record as a whole, it will not reiterate all of the testimony and other evidence herein. It will, however, endeavor to address defendant's principal contentions.

The Court agrees with defendant that a lawyer may reasonably perceive himself to be a "trial attorney" even though he may actually try cases to verdict infrequently. To honestly represent oneself as a trial attorney, however, one must at least be ready and willing to proceed to trial if and as necessary to [*3]resolve a client's case. There was evidence that defendant expressly forsook trial work in 1984, long before claiming to be disabled for such work, and did indeed desist thereafter. When cases proceeded to trial, defendant assigned or referred them to others. This evidence was highly credible. That defendant sat as second-chair in one trial in 1991 at the behest of referral counsel at which defendant did not actively participate in any way does not

obviate the strong showing that he had voluntarily ceased to practice as a trial attorney.

The court agrees with defendant that there was no showing that "the duties of a bookstore worker" and "those of a trial attorney" are "identical." This, however, is beside the point. The government made so [sic] such contention. What the government demonstrated with the testimony of witnesses who observed defendant at the bookstore was that he did not exhibit the type of hearing or back impairment which would preclude work as a trial attorney, and certainly not as an attorney who renounced trial work and referred cases for trial to others. These witnesses were credible.

There was evidence, including visual evidence, of defendant engaging in activity from which someone with his claimed condition would reasonably be expected to refrain. There was considerable evidence that defendant was untruthful in telling a Provident representative that he was bedridden. There [*4]was evidence that defendant was untruthful in telling Provident in 1994 that he had lost a case because of difficulty hearing in court.

A rational, and indeed the most reasonable, conclusion from the clear weight of the lay and medical evidence is that defendant had a moderate hearing loss in one ear and a back condition which interfered with his ability to work only rarely over the six year period of 1994 through 2000.

The court agrees with defendant that "a doctor who golfs every weekend" would not reasonably be characterized as engaging in the occupations of "both a doctor and a golfer." The court also agrees that the evidence shows defendant's bookstore was not profitable. The Court cannot agree, however, that defendant owned and

worked at this bookstore as a "hobby." That a business venture is unprofitable does not make it a hobby.

There was evidence that defendant worked many hours at the bookstore which he kept open seven days a week, hired employees to work there, maintained insurance for the business and paid business and employment taxes. The clear weight of the evidence shows that defendant's objective was to sell books to customers at a profit. Indeed, a videotaped interview presented by the defense shows that defendant thought there was a demand for his product and was seeking to attract customers through publicity. That defendant also professed thoroughly to enjoy his [*5]involvement with the bookstore would not transform an occupation into a hobby. Many people enjoy their work.

Moreover, defendant's hours at the bookstore certainly comprised part of his daily activities. Yet, he omitted all information about his work at the bookstore when questioned directly by Provident about his daily activities.

A jury quite reasonably could have found that defendant voluntarily withdrew from trial work before the onset of his claimed disability; that he was able to perform the essential duties of a lawyer who refrains from trying cases, and indeed even of one who does; and, that he progressively withdrew from a law practice which had become increasingly unprofitable, and shifted his focus to his bookstore as a principal occupation.

Viewing the evidence in a light most favorable to the government, a jury quite rationally could conclude beyond a reasonable doubt that defendant knowingly misrepresented his occupational specialty and physical limitations, and concealed information about his opera-

tion of a bookstore, with the intent fraudulently to obtain disability insurance benefits for which he knew he did not qualify.

The court cannot scrupulously disagree with the determinations of credibility evidently made by the jury. It is true that Harold Kaufman, defendant's former law partner who gave particularly damaging testimony regarding the statement about [*6] trial work in 1984, did seem to exude considerable personal hostility toward Mr. Nissenbaum. Defendant, however, acknowledged making this statement and uncontroverted evidence regarding defendant's practice in the following years substantiated his determination to avoid participation in trials. Testimony regarding the falsity of defendant's representation about losing a case due to a hearing problem came from his nephew who had no apparent animosity toward defendant. The court cannot conscientiously conclude that the weight of the evidence heavily preponderates against the verdict or that a miscarriage of justice will occur if it is not set aside.

ACCORDINGLY, this _7th_ day of May, 2001, upon consideration of defendant's Motion for Judgment of Acquittal (Doc. #35-1) and alternative Motion for New Trial (Doc. #35-2), and the response of the government thereto, **IT IS HEREBY ORDERED** that said Motions are **DENIED**.

BY THE COURT:

/s/Jay C. Waldman/__
JAY C. WALDMAN, J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

01-2599

UNITED STATES OF AMERICA
v.
ROBERT M. NISSENBAUM,
Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Action No. 00-cr-00570)
District Judge: Honorable Jay C. Waldman

Submitted Under Third Circuit LAR 34.1(a)
on June 13, 2002

Before: BECKER, Chief Judge, SLOVITER,
SCIRICA, NYGAARD, ALITO, ROTH, McKEE,
RENDELL, AMBRO, BARRY, FUENTES, SMITH
and ROSENN*, Circuit Judges

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* Honorable Max Rosenn, Senior Third Circuit Judge,
vote limited to panel rehearing only.

ORDER

The petition for rehearing en banc filed by the appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT.

/s/Jane R. Roth
Circuit Judge

Dated: **DEC 13 2002**